IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-896

BURLINGTON NORTHERN INC.,
Petitioner,

v.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, an Agency of the United States of America; and GEORGE S. IVES, DAVID H. STOWE, and PETER C. BENEDICT, Members of the National Mediation Board,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

Section 2 Fourth of the Railway Labor Act (45 U.S.C. § 152 Fourth) provides for "craft or class" representational units, unlike the Labor Management Relations Act under which any "appropriate" unit may be a representational unit (29 U.S.C. § 159). In the *Switchmen's*

Union case,[1] the Court of Appeals held that the prescribed "craft or class" representational units on a consolidated railroad *must* be carrier-wide in scope, whereas in this case the Court of Appeals held that they need not be. The decision in the *Switchmen's Union* case was supported by the legislative history of the "craft or class" provisions of the Act, which explicitly demonstrates that the draftsmen intended carrier-wide representational units, and by the decisions of the National Mediation Board, which has consistently required such units over a period of 40 years. (See Pet. 16-22)

Respondent ARSA deals with the conflict between the decision below and the decision in the *Switchmen's Union* case, the legislative history, and the consistent administrative decisions in a single cursory paragraph in its brief in opposition—Paragraph C on pages 16-17. In that paragraph, ARSA dismisses the rule for which these authorities stand—that the "craft or class" representational units prescribed by Section 2 Fourth must be carrier-wide in scope even on a merged railroad—on the ground that in this case no employee is presently challenging ARSA's representation claims under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth). That is a curious claim in light of the fact that the NMB will not entertain petitions under Section 2 Ninth that do not seek carrier-wide certification, as the former Great Northern technicians discovered when they sought to dislodge ARSA. (See Pet. 6, 19 n. 29, 52a-53a.) It is even more curious in light of the fact that the NMB has now ruled against ARSA under Section 2 Ninth with respect to representation of mechanical supervisors, at least as we understand its ruling. (See Pet. 11, 50a-51a.) More fundamentally, however, ARSA fails to explain what the

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[1] *Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785 (D.C. Cir. 1943), *rev'd for lack of jurisdiction*, 320 U.S. 297 (1943).

pendency of a petition under *Section 2 Ninth* has to do with the scope of the "craft or class" representational units prescribed by *Section 2 Fourth*. The "distinction" advanced by ARSA has no relevance to the question presented.

The remainder of pages 1-17 of ARSA's brief in opposition is devoted to arguments addressed to the merits of the statutory issues, arguments that concern the interpretation of the merger protection agreement, and uncomplimentary characterizations of our petition for certiorari. However, a detailed response on the merits is properly a matter for a brief on the merits; the interpretation of the agreement is properly a matter for the arbitrator; and the characterizations of our petition —the claims that we are responsible for "misstatements" (p. 3), "false" statements (p. 4) and "incredible assertions" (p. 4), and that our position is "bizarre" and "delusional" (p. 9)—reflect an approach to advocacy for which we lack enthusiasm. We are satisfied to rely on the record.

We do note, however, that ARSA and Burlington Northern disagree very much with respect to the question whether the Mediation Board has "repudiated" Burlington Northern's position; or whether instead the Board's dismissal of another organization's petition for certification as the representative of one of the groups ARSA claims to represent—the former Great Northern technicians—simply reflects the Board's view that "craft or class" representational units must be carrier-wide in scope. The latter explanation of the Board's actions is the only one that makes any sense to us, and ARSA suggests no other explanation for those actions. In any event, the Mediation Board is a respondent. Therefore, there is no reason why either the Court or the other parties should be required to speculate about the nature

of its determinations. The Solicitor General can readily file a response on its behalf that makes its position plain.[2]

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] We note also that ARSA claims that the Interstate Commerce Commission required the merging railroads to enter into agreements recognizing ARSA as the collective bargaining representative after the merger of the groups ARSA claims to represent. (Br. Opp. 7, 15.) There is no need to guess about the Commission's position either, because that too can be ascertained by the Solicitor General. We think the notion that the Commission involved itself with representational issues will come as a complete surprise to the Commission, which affords identical protection to both represented and unrepresented employees and has never inquired into representation. See Pet. 48a-49a; *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 347 I.C.C. 536, 548-549 (1974).